No. 92-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF AMICI CURIAE OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA AND THE SOUTHERN UTE INDIAN TRIBE IN SUPPORT OF PETITIONER

RICHARD DAUPHINAIS
Native American Rights Fund
1712 N St., N.W.
Washington, D.C. 20036
(202) 785-4166
Counsel of Record

YVONNE T. KNIGHT
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
Attorney for the Cheyenne-Arapaho Tribes of Oklahoma

SCOTT B. MCELROY
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021
Attorney for the Southern Ute Indian Tribe

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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Interests of Amici Curiae

The Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe submit this brief *amici curiae* in support of the Petition for Writ of Certiorari filed by petitioner, Keene Corporation. Keene and the United States have consented to the filing of this brief and their letters of consent have been filed with the Court.

The United States holds oil and gas resources in trust for the Cheyenne-Arapaho Tribes of Oklahoma. In 1976 the Tribes entered into five-year oil and gas leases with two oil companies. As those leases were about to expire, the government approved, without Tribal consent, communitization agreements that would have extended the terms of the oil and gas leases on Tribal land. The Tribes filed suit for agency review and injunctive relief in federal district court. The Tribes sought to void the government's approval and to keep the agreements from taking effect. The Tribes later filed an action in the United States Claims Court to recover any damages resulting from the government's approval of the agreements. The Claims Court suit was stayed pending the outcome of the district court litigation. The district court ruled for the Tribes in 1989 and that decision has been affirmed by the Tenth Circuit Court of Appeals. *Cheyenne-Arapaho Tribes of Oklahoma v. The United States of America, et al.*, 966 F.2d 583 (10th Cir. 1992). The government has moved to dismiss the Tribes' Claims Court case on the basis of 28 U.S.C. §1500 and the Federal Circuit's recent decision in *UNR Industries, Inc., et al. v. The United States*, 962 F.2d 1013 (Fed.Cir. 1992) ("*UNR*").[1]

The Southern Ute Indian Tribe is the beneficial owner of coal underlying the Southern Ute Indian Reservation. The United States holds legal title to the coal as trustee for the Tribe but in many instances

[1] That is the *in banc* opinion of the Federal Circuit. The earlier panel decision is reported at *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed.Cir. 1990). The Claims Court opinion is reported at *Keene Corporation v. United States*, 17 Cl.Ct. 146 (1989).

the remainder of the estate is privately owned. On those lands, oil companies and landowners have begun to develop substances commonly known as coalbed methane from the Tribe's coal without Tribal consent. Although holding the coal in trust, the federal government has refused to protect the Tribe's resources. The Tribe filed suit in federal district court against the oil companies and the landowners to stop development of the coalbed methane in the absence of Tribal consent. The Tribe also sued the Secretary of the Interior (and subordinates) for injunctive relief. The Tribe seeks to force the Department of the Interior to carry out the government's duties as trustee for the Tribe. The Tribe filed a second suit in the Claims Court for damages for the United States' past failure to protect the Tribe's interest in coalbed methane. The government has moved to dismiss the Tribe's Claims Court action based on 28 U.S.C §1500 and the *UNR* decision.

Both the Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe have a significant interest in supporting the consistent and longstanding interpretation of 28 U.S.C. §1500 made by the United States Court of Claims, the Federal Circuit Court of Appeals, and the United States Claims Court before the Federal Circuit's decision in *UNR*. The Tribes relied on that interpretation in proceeding against the federal government in United States district courts and in the United States Claims Court. If the *UNR* decision stands, the Tribes' Claims Court suits would be subject to dismissal.

Argument

The *In Banc UNR Industries* Decision Should be Reviewed Because it Overturns Established Precedent That Correctly Interpreted 28 U.S.C. §1500

The *UNR Industries* decision involves the interpretation of 28 U.S.C. §1500. In its present form that statute provides:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Since its original enactment in 1868, the Court of Claims, the Claims Court and the Federal Circuit have been called upon to construe §1500 many times. In doing so, those courts consistently concluded that §1500 allowed litigants to simultaneously assert claims for non-monetary equitable relief in the federal district courts and claims for damages in the Court of Claims and, later, the Claims Court. *See e.g. Casman v. United States*, 135 Ct.Cl. 647 (1956); *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed.Cir. 1988); *Marks v. United States*, 24 Cl.Ct. 310 (1991).[2]

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[2] *See also Allied Materials & Equipment Company, Inc. v. United States*, 210 Ct.Cl. 714 (1976); *Mary L. Prillman v. United States*, 220 Ct.Cl. 677 (1979); *Truckee-Carson Irrigation District*

In such cases, the Court of Claims and Claims Court routinely stayed proceedings until the district court action was complete. *See e.g. Prillman*, 220 Ct.Cl. 677; *Truckee-Carson Irrigation District*, 223 Ct.Cl. 684. Thus the government would not have to defend two actions at the same time. Further, the resolution of legal and factual issues in the district court would be binding on the parties in the Claims Court and there would be no basis to relitigate those issues.

The *Casman* interpretation of §1500 became the "settled law" of the Court of Claims. *Truckee-Carson Irrigation District*, 223 Ct.Cl. at 685. When Congress created the Claims Court in the Federal Courts Improvement Act of April 2, 1982, 96 Stat. 25 (codified as amended in scattered sections of the United States Code), §1500 was amended to make it applicable to that Court. Congress made no changes to §1500 in response to the longstanding *Casman* interpretation and the consistent line of precedent following that interpretation. And, as noted the Claims Court and Federal Circuit continued to adhere to the *Casman* interpretation after 1982. *Boston Five Cents Savings Bank*, 864 F.2d 137; *Marks*, 24 Cl.Ct. 310.

In the *in banc UNR* decision, however, the Federal Circuit made a sweeping change in the interpretation of §1500. Despite the exceptions to the application of §1500 found by earlier courts, the Federal Circuit ruled that §1500 absolutely precluded Claims Court

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v. United States, 223 Ct.Cl. 684 (1980); *City of Santa Clara, California v. United States*, 215 Ct.Cl. 890 (1977); *Pitt River Home and Agricultural Cooperative Association v. United States*, 215 Ct.Cl. 959 (1977); *Minoui Hossein v. United States*, 218 Ct.Cl. 727 (1978); *The Deltona Corp. v. United States*, 222 Ct.Cl. 659 (1980).

jurisdiction whenever a claim based on the same set of facts was pending in another court. *UNR*, 962 F.2d at 1021. In addition, and although the *Casman* interpretation did not appear to be before the court, the Federal Circuit overruled "cases like *Casman*, 135 Ct.Cl. 647, *Hossein*, 218 Ct.Cl. 727, and *Boston Five Cents*, 864 F.2d 137". *UNR*, 962 F.2d at 1022 n.3.

The result for amici Cheyenne-Arapaho Tribes and the Southern Ute Tribe is that they face dismissal of their pending Claims Court actions. Although the Cheyenne-Arapaho Tribes have, so far,established a breach of the government's trust responsibility they would be unable to obtain damages for that breach. They could not assert a damages claim in the district court because that court's jurisdiction is limited to actions for less than $10,000. 28 U.S.C. §1346(a)(2). They could not refile their Claims Court case because the six year statute of limitations, 28 U.S.C. §2501, would have run on their claims. The litigation of the Southern Ute Tribe is at an earlier stage but the Tribe faces the same prospect if its Claims Court suit is dismissed and its district court action takes more than six years to complete.

Indeed, all Indian tribes are adversely affected by the Federal Circuit's decision to overturn the *Casman* interpretation of §1500 in *UNR*. The federal government has a pervasive presence in the day-to-day activities of tribes. If a tribe is aggrieved by the action or inaction of the government, the practical effect of the *UNR* decision is to force tribes to choose between review of the government's actions and injunctive relief in the district courts or damages in the Claims Court. If a tribe chooses to pursue injunctive relief and that litigation takes more than six years, the tribe

will be precluded by the statute of limitations from filing a second suit for damages in the Claims Court. That cannot be the result intended by Congress.[3] Section 1500, the Tucker Act, 28 U.S.C §§1491 and 1346, the Indian Tucker Act, 28 U.S.C §1505, and the Administrative Procedure Act, 5 U.S.C. §§551-559 and 701-706, must be construed reasonably and harmoniously as the Court of Claims, Claims Court, and Federal Circuit did prior to the *UNR* decision.

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[3] Chief Judge Nies, concurring in *UNR*, 962 F.2d at 1025, and Judge Plager, dissenting, *Id.* at 1026, both expressed concern about the statute of limitations implications of the Federal Circuit's decision.

Conclusion

For the foregoing reasons, the Supreme Court should accept review of the Federal Circuit's *in banc UNR Industries* decision.

Respectfully submitted,

RICHARD DAUPHINAIS
Native American Rights Fund
1712 N St., N.W.
Washington, D.C. 20036
(202) 785-4166
Counsel of Record

YVONNE T. KNIGHT
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
Attorney for the Cheyenne-Arapaho Tribes of Oklahoma

SCOTT B. MCELROY
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 240
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(303) 442-2021
Attorney for the Southern Ute Indian Tribe

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